Chapter CLXVI.

GENERAL ELECTION CASES, 1907 TO 1910.

121. The Illinois election ease of Michalek v. Sabath, in the Sixtieth Congress.

Where contestant's contention, even if substantiated, would not operate to change the return, the committee declined to order evidence.

Form of stipulation between contestant and contestee for a recount.

On May 26, 1908,[1] Mr. Michael E. Driscoll, of New York, from the Committee on Elections No. 3, presented the report in the case of Michalek *v.* Sabath, from Illinois.

While the case was pending in the committee the contestant and contestee, by their respective attorneys, entered into a stipulation for a recount of the ballots as follows:

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*
STATE OF ILLINOIS, *County of Cook, ss:*

ANTHONY MICHALEK, CONTESTANT, *v.* A. J. SABATH, CONTESTEE.

Election contest in the Fifth Congressional district of Illinois.

It is hereby stipulated and agreed by and between Anthony Michalek, contestant, and A. J. Sabath, contestee, the parties to the above-entitled election contest, that the notices to take depositions provided for in section 108 of the Revised Statutes of the United States be, and the same are hereby, waived; and the parties hereto further agree that said depositions may be taken without such notices.

It is further agreed by and between the parties hereto that said depositions shall be taken before Joseph Pniewski, a notary public residing in the said Fifth Congressional district, and that the depositions of the members of the board of election commissioners and of the chief clerk of the board of election commissioners shall be taken in the room usually occupied by the board of election commissioners of the city of Chicago, Ill., and that the depositions of any other witnesses who may be called on the part of the contestant shall be taken at the office of Tenney, Coffeen, Harding & Wilkerson, No. 205 La Salle Street, Chicago, Ill., and the depositions of all other witnesses who may be called by the contestee shall be taken at the office of Frank L. Childs, No. 100 Washington Street, Chicago, Ill.

[1] First Session Sixtieth Congress, House Report No. 1778; Record, p. 7011; Moores' Digest, p. 36.

It is further stipulated that the contestee reserves the right to name some qualified officer to officiate with the said Joseph Pniewski in accordance with section 118 of the Revised Statutes of the United States.

It is further stipulated that proof of the official character of the officers hereinbefore referred to be, and the same is hereby, waived.

It is further stipulated and agreed that the taking of said depositions and the recounting of the ballots cast for Member of Congress in said Fifth Congressional district at said election, as herein agreed to, shall begin on Saturday, the 9th day of February, 1907, and shall continue from day to day thereafter until the ballots east in precincts 1 to 10, inclusive, of Ward 9, have been recounted, and that thereupon the taking of said depositions and the recounting of said ballots shall be continued to Monday, the 6th day of May, 1907, and shall continue from day to day thereafter until the same are completed, and that so far as the recounting of the ballots so cast in said election as aforesaid is concerned all the time necessary to properly recount the same, as above provided, may be used, irrespective of the requirements of section 107 of the Revised Statutes of the United States, and that said testimony with reference to such recounting shall be taken at such times and under such circumstances as will best suit the convenience of said board of election commissioners.

It is further stipulated that with reference to testimony in said matter other than that relating to the recounting of the ballots the same shall not be taken until after said ballots have been recounted, and that after said recount has been finished, the time Allowed for taking any such additional testimony shall be ninety days, and the testimony shall be taken in the following order: Said contestant shall take testimony during the first forty days following the completion of said recounting of the ballots, said contestee during the succeeding forty days thereafter, and said contestant may take testimony in rebuttal during the remaining ten days of said period.

ANTHONY MICHALEK,
By JAMES H. WILKERSON,
CHARLES M. THOMSON,
His Attorney.
A. J. SABATH,
By FRANK L. CHILD,
His Attorney.

On the face of the returns from the district the contestant had received 8,634 votes and the contestee 9,545 votes, a majority of 911 votes for the sitting Member. The recount under the stipulation gave the contestant 8,628 votes and the contestee 9,347 votes, a majority of 719 votes for the sitting Member.

The contestant applied to the committee for an order directing the board of election commissioners of the city of Chicago, before whom the recount had been made, to produce the ballots before the committee for reexamination.

The committee by a unanimous vote denied the application on the ground that—

If the ballots were produced and if they were just as described in the evidence they would not be considered such conclusive evidence of fraud or conspiracy as to justify the committee in rejecting and casting out of the count any precincts in said district unless such evidence contained in the ballots themselves was corroborated by some evidence of conspiracy, fraud, carelessness, or ignorance on the part of the election officers or others; and since no such evidence appears in the record in this case, your committee believes that no different result could be arrived at than that reached by the board of election commissioners of the city of Chicago if the ballots were produced before this committee and reexamined.

Having denied the application for the production of said ballots before this committee, no other conclusion can be reached except to confirm the report and count made by the board of election commissioners and find in favor of the contestee.

The committee then recommended the passage of resolutions declaring the contestant was not elected and contestee was elected, and the resolutions were agreed to by the House without debate or division.

122. The South Carolina election cases of Dantzler v. Lever, Prioleau v. Le gare, and Myers v. Patterson in the Sixtieth Congress.

The House declined to consider statements of persons alleging an illegal denial of the right to vote but failing to submit evidence.

The House will not invalidate an election because a State has disregarded reconstruction legislation as to qualifications of voters.

On January 5, 1909,[1] Mr. James R. Mann, of Illinois, from the Committee on Elections No. 1, reported on the South Carolina cases of Alexander D. Dantzler *v.* Asbury F. Lever, Aaron P. Prioleau *v.* George S. Legare, and Isaac Myers *v.* J. 0. Patterson.

The cases involved the constitutionality of the South Carolina registration and election laws, and their alleged discrimination against colored voters in violation of the fourteenth and fifteenth amendments to the Federal Constitution.

As each of the cases involved the same question, the committee heard the three cases together.

The same question had been passed upon after exhaustive argument in the Fifty-eighth Congress in the case of Dantzler *v.* Lever, and the committee confirmed the conclusion arrived at in that case, quoting the report verbatim in each case.

In the case of Prioleau *v.* Legare the contestant also offered in evidence lists of names attached to statements in the following form:

UNITED STATES OF AMERICA,

State of South Carolina:

From the First Congressional District to the Sixtieth Congress.

This is to certify that we, the undersigned, are citizens of the United States and citizens of the State of South Carolina, and residents of the counties of the first district in the aforesaid State.

That each of us is over 21 years of age and upward and duly qualified to vote under the Federal Constitution and laws and under the act of 1868.

And that we had applied to the officials of registration for the State and counties that compose the said district in the State aforesaid to be registered to vote previous to the general election held on the 6th day of November, A. D. 1906, for Representative in the Sixtieth Congress, but were deprived by the partisan administration of the election law by the officials acting under the unconstitutional election laws of the aforesaid State enacted in the year 1895 that discriminate against negro citizens and Republicans by the Democratic supervisors and managers who compose the election board absolutely. Wherefore, had we been allowed to vote as we desired so to do, we would have voted for Aaron P. Prioleau, Republican, for Representative in the Sixtieth Congress from the counties that compose the First Congressional district in the aforesaid State on the 6th day of November, 1906.

All of which we most earnestly subject our names.

These lists were certified to in the following form:

UNITED STATES OF AMERICA,

State of South Carolina:

First Congressional District to the Sixtieth Congress.

Personally appeared before me T. Bacot, agent, who, being duly sworn according to law, deposes and says that he is a colored citizen of the State of South Carolina and a resident of the

[1] Second session Sixtieth Congress, House Reports 1817, 1818, 1819; Record, p. 484.

county of the first congressional district in the aforesaid State. That he herein certifies that the record of the names of 101 voters at ward 2, first precinct, is true and correct, and that he has read the heading of the list above.

T. BACOT, *Agent.*

Agent for contestant sworn to and subscribed before me this 21st day of February, A. D. 1907.

E. F. SMITH,

Notary Public for South Carolina.

No other evidence on the subject was submitted. Similar lists were offered in the case of Myers *v.* Patterson.

The committee reported:

The attempt to show that the contestee was not elected by relying upon statements to that effect over a large number of real or imaginary names written by one person is too ridiculous to require discussion.

In each report the committee recommended resolutions declaring that the contestant was not elected and that the contestee was elected.

On January 23, 1909,[1] the House agreed to the three reports without debate or division.

It is to be noted that the decisions in these cases differ from those rendered in similar cases in the Fifty-eighth and Fifty-ninth Congresses in that they confirm the title of the sitting Member. Former decisions merely declare the contestant not elected without passing upon the title of the sitting Member.

123. The New Mexico case of Larrazola v. Andrews, in the Sixtieth Congress.

Evidence that persons whose names appeared on the poll books were no longer employed in the locality and presumably had left before election day was deemed inconclusive proof of illegal voting.

When it was impossible to determine for whom certain illegal votes were cast, they were deducted pro rata from the votes counted for contestant and contestse, respectively.

The entering of names on the poll books following those of the judges, who testified they voted last, was held to justify the rejection of such votes.

The appearance of names in alphabetical order on the poll books was held not sufficient to justify rejection of the poll in the absence of other evidence of fraud.

On February 25, 1909,[2] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted the report in the New Mexico case of Larrazola, *v.* Andrews.

The official vote had been returned as follows: For Andrews, 22,915 votes; for Larrazola, 22,649 votes; for Metcalf, 211 votes; an apparent majority for Andrews of 55 votes.

Larrazola served notice of contest, embracing 52 specifications, more or less general in character, against the regularity of the election of Andrews, who in turn filed allegations against the regularity and legality of votes cast for Larrazola.

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[1] Second session Sixtieth Congress, Record, pp. 1343, 1344.

[2] Second session Sixtieth Congress, House Report No. 2246; Record, p. 3116; Moores' Digest, p. 37.

The report made rulings in certain specific cases.

As to Yankee precinct:

The voting population consists chiefly of persons working for a coal company. Fifty-eight persons were returned as having voted in that precinct, some of whom were shown by the time sheets of the coal company to have quit work a few days and others a longer time before election. There is no positive proof that they left the precinct, but there is testimony that it is customary for men to leave the camp very soon after stopping work. These coal camps, it seems, are private property, closely guarded, and it is in evidence that persons having no business there are not allowed to remain. There is no evidence that any of the men actually did leave before election day, or that they were present anywhere else on election day.

There were also a few of them shown by the time sheets not to have commenced work within the residence period required by the statute prior to election day. There is no proof whether they were or were not within the precinct long enough before election to entitle them to vote. Considered in connection with the transfer privilege allowed by the law of the Territory, whereby a voter entitled to vote in one place may obtain the right to vote in a distant precinct, the evidence does not conclusively show that these 56 votes were illegal.

The majority of the committee agreed, however, that there was direct proof of fraud on the part of election officers which impeached 103 votes cast in this precinct, and disposed of the votes in question as follows:

There is no evidence showing, or tending to show, for which of the candidates any one of these 103 alleged illegal votes were counted, and contestant suggests, as one way of disposing of the matter without disfranchising admittedly honest voters, that they be deducted pro rata from the votes counted for Andrews and himself, respectively. This would result in deducting 85 from the vote of Andrews and 18 from the vote of Larrazola.

As to precinct No. 17, San Rafael:

From the testimony of the judges of election and others it appears that after a fair election had been held and the returns thereof duly signed the poll books were taken away by some one and 56 names fraudulently entered therein.

The evidence shows that the judges voted last and that their votes completed the 136. Subpoenas were issued for the 56 men appearing from the poll books to have voted after the 136 admittedly legal votes had been cast. Seventeen of them were found. They testified that they did not vote. This seems a sufficiently dear case of fraud to justify the deduction of 56 from the plurality of Andrews.

As to the appearance of names upon the poll book in alphabetical order, the report says:

In the precinct of Van Houten, in Colfax County, contestant attacks 95 votes upon the ground that the voters appear upon the poll book in alphabetical order; not that the entire 9,5 were so arranged all together, but that in the total list of 460 there are found various bunches aggregating 95. Thus voters Nos. 153, 154, 155, 156, and 157 each bore the surname "Vuetich." There are other cases of four or more consecutive numbers where the first letter is the same but the surnames different. Unquestionably where any considerable number of names appear on the poll book as having voted in alphabetical order the circumstance is suspicious. With other evidences of fraud such alphabetical voting would be highly corroborative.

In the case of Manzanares *v.* Luna (Rowell, 399) it appeared that many names on the poll books were obviously fictitious; that they appeared in alphabetical order, as if copied from some index or registration; that in one or two cases the whole returns were forgeries, and that in one case the election was held the day before election day. In fact, there was abundant evidence of fraud, of which the alphabetical arrangement was only one corroborative item, and a large number of votes were thrown out. But here there is no evidence of fraud whatever, except so far as the alphabetical voting itself may be deemed such evidence. Contestant has not offered to prove that any of the names appearing upon the poll book were fictitious, or that persons answering to

those names did not, in point of fact, vote. Can we throw out these votes in the absence of any positive evidence of fraud of any kind, particularly if there is any way of accounting for their alphabetical order upon any other hypothesis than that of fraud? May it not well be that the five persons of the name of Vuetich are members of one family and came together to the Polls?

The evidence shows that there is no personal registration in New Mexico. The registration lists are made up by officers elected for that purpose and are invariably arranged in alphabetical order. The registration lists are used by political workers and consulted from time to time for the purpose of noting what persons have not voted. As the day wanes they look up those persons, to some extent in the order in which they appear upon the registration list, and bring them in to vote. Can we, from the fact that two C's were followed by two E's and they by four B's upon the poll book, conclude, in the absence of any other evidence, that there was such fraud as to require all these 95 votes to be rejected? There has been no attempt made to show that any of these 95 persons did not vote or were not lawfully entitled to vote. Furthermore, there is not a particle of evidence to show for which candidate all or any of their votes were cast or counted.

In the precinct of Bibo, in Valencia County, 59 votes were returned as cast for Andrews. The sole ground on which they are contested is that the names appear upon the poll book in the same order as on the registration list. Upon the other hand, it is urged that this fact is accounted for by the fact that as a person appeared and voted his name was checked off upon the registration list, and later the poll book was made up from the names so checked upon that list. This appears entirely plausible, particularly in view of the fact that the names upon the registration list do not all appear in the poll book. It would seem that whenever a man whose name was upon the registration list failed to vote his name was not put upon the poll book. Thus, Bibo, Simon, is the eighteenth name upon the registration list and also upon the poll book. Bibo, Ivan is the nineteenth name upon the registration list, but as he apparently did not vote his name was not entered in the poll book. Ten names in all appearing in various places upon the registration list do not appear upon the poll book as having voted.

If there has been fraud attempted, would not all the names on the registration list have been used and perhaps more added? It is not pretended that the 59 persons recorded as having voted did not actually vote or were not entitled to vote. Contestant did not subpoena, one of them to testify, or attempt to prove in any other manner that they had not actually voted or that they did not cast their votes for Andrews. Had there been fraud, it could easily have been proved. In the absence of such proof, can we, from the mere coincident of the order of the names in the two books, assume that the votes as returned were all fraudulent, and that, in point of fact, no honest votes were cast in the precinct? If the votes were actually and honestly cast, and it was the duty of the election officers to record them in the poll books precisely in the order in which they were cast, can we disfranchise all the voters because the election officers, instead of recording the names of the voters in the poll book as they voted, chose to check them off on the registration list first and afterwards copy the names into the poll book?

It is a well-established principle of law that a lawful vote, honestly cast, may not be rejected because of irregularity in the conduct of an election officer. Upon the record as it stands we are clear that these votes must be counted as returned.

124. The case of Larrazola v. Andrews, continued.

A lawful vote, honestly cast, may not be rejected because of irregularity in the conduct of an election officer.

In the absence of proof to the contrary, the presumption is that the election officers performed their duties in every respect.

The burden of proving error or falsity of election returns rests upon the contestant.

Unless it is shown for whom a vote alleged to be illegal was cast, the complaint must be disregarded.

Error in the spelling of names on the poll books does not vitiate the returns.

Among the allegations of irregularity by the contestant was the counting for contestee of votes cast by persons of foreign birth who had not been naturalized.

The election laws under which the election was held provided that—

Every person who is not a native citizen of the United States or adopted citizen of this Territory who may present himself to vote at any election in this Territory shall be examined by the judges of election in whose precinct he may apply to vote, and if he prove to the satisfaction of the said judges that he has legal letters of naturalization or of citizenship he shall be allowed to vote.

No evidence was introduced showing failure upon the part of the judges of election to comply with the law in this respect, and the majority of the committee decided that:

In the absence of proof to the contrary the presumption is that the judges of election performed their duty in every respect. This complaint therefore must be disregarded.

As to the spelling of names:

It was also alleged that persons voted who were not registered.

The report says:

There are allegations that number of persons voted without having been registered. This, however, is not fully sustained by the evidence and is based mainly upon errors in spelling occasioned, possibly, by errors in transcribing from one book to another or from the fact that the officer in charge of the poll book, hearing the name of the voter, spelled the name as it sounded to him. Thus, James Hewart is recorded as voting under the name of "James Stewart." J. P. Lane appeared on the poll book as "J. R. Lane." In another case the name "Ashe" appeared upon one book and "Athe "upon the other. So, "Lewis "appeared upon one book and "Louis "upon another. "George Gerch" appeared upon one book and the name is spelled "Girst" upon the other. These, we think, were mere errors in recording, which ought not to vitiate the return.

125. The case of Larrazola v. Andrews, continued. Where the election laws prohibited the acceptance of a nomination from more than one party, the distribution of the ballots of a particular party to which were attached stickers bearing the name of a candidate not nominated by such party was held to be unlawful.

In the absence of law requiring ballots to be counted in the voting place in which they were cast, the removal of ballot boxes to another place for counting was held not to constitute evidence of fraud.

Failure to comply with a requirement of the election law does not invalidate a vote unless the law so provides.

When under the forms of law the sitting Member has been duly certified as elected, the legal presumption is that the returns are correct, and the burden of proof to the contrary rests upon the contestant.

Instance wherein a minority report criticized the election laws of the State in which the contested election was held.

The contestee claimed that numbers of illegal votes were counted for the contestant in certain counties in which there was a fusion ticket for local officers, but on which no candidate for Congress was named.

The law of New Mexico provided:

SECTION. 1. That hereafter when any political convention held in this Territory or any county thereof for the purpose of nominating candidates to be voted for at any election held in this Territory or any county thereof, and the names of the candidate or candidates nominated by such convention, and certified to by the presiding officer of such convention and the secretary thereof, shall have been filed with the probate clerk of the county in which such convention was held, it shall be unlawful for any other political convention, person, or persons to print, or cause to be printed or circulated, any ticket or ballot having thereon the name or names of the candidate or candidates nominated by such political convention: *Provided,* That nothing in this section shall be construed to prohibit any person from erasing or changing in any manner any name on any such ticket or ballot voted by such person: *And further provided,* That this act shall not be so construed as to prevent any executive committee of any political party holding such convention from substituting the name or names of any candidate selected by such committee by authority of such convention to fill any vacancy caused by the death, declination, or retirement of any candidate nominated by such convention.

It also provided that:

No political party shall select any device or emblem or any portion thereof the same as, similar to, or that is liable to be confounded with or mistaken for the device or emblem then in use by any other political party.

It further provided that:

No person shall accept a nomination to more than one office nor from more than one political party. Ballots other than those printed by the respective county recorders according to the provisions of this act shall not be cast, counted, or canvassed in any election. Every ballot printed under the provisions of this act shall be headed by the name and emblem of the political party by whom the candidates whose names appear on the ballots were nominated, and each of said ballots shall contain only the names of the candidates nominated by said party.

It appears from the evidence that the fusion ticket carried a blank space in which the voter might write the name of the person for whom he desired to cast his vote for Delegate. Both candidates distributed large numbers of these tickets with stickers bearing his name affixed in this space.

The report says:

The distribution of these ballots having pasted upon them a printed sticker bearing the name of a person who was not nominated by the People's Party, and as a candidate for an office for which no nomination was made by that party, was not lawful.

There is no evidence from which we can determine how many such ballots were cast for Larrazola and how many were cast for Andrews. Therefore it is impossible to determine to what extent the result was affected.

The contestee also charges that in one precinct the election officers took the ballot box with them from the blacksmith shop, in which the election was held, to a church sociable, where they ate supper and then adjourned to the sampling room of a hotel, where the ballots were counted.

The report says:

This was, of course, irregular, but aside from its irregularity there is absolutely no evidence of fraud or mistake. There was no law specifically requiring the ballots to be counted in the blacksmith shop where the election was held.

The law of New Mexico provides for a system of absentee voting under which it was possible for one who had been duly registered and who expected to be away from home on election day to obtain a transfer authorizing him to vote elsewhere in the State. It was contemplated by the law that these transfers should be deposited

by the election officers in the ballot box with the ballot. It was claimed that in certain instances this was not done.

The majority, in passing on this question in their report, say:

> Would it be right to disfranchise the voter because an election officer failed to perform his whole duty? We do not understand that by the law of New Mexico the vote is declared invalid because of failure to deposit the transfer in the ballot box.

In summing up the case the report finds:

> The testimony in the case enters very largely into the realm of conjecture.
>
> When, under all the form of law, a person has been duly returned and certified as elected to a seat in Congress, the legal presumption is that the sworn officers of the law have performed their duties and that the returns are correct. In order to successfully impeach that return the contestant must do more than raise doubts as to its correctness. Upon him there rests the burden of proving the falsity or error of that return. The proof offered in this case is not sufficient for that purpose.

A minority statement, signed by two members of the committee, declares that:

> Without filing any assent or dissent to the above report, it is our judgment that the election system in New Mexico is radically defective; that the imperfect manner of registering voters, as well as the loose method of casting the ballots, renders it easily possible for the most outrageous frauds to be committed thereunder.
>
> In the case before us we have discovered many inexcusable irregularities, if not frauds, all traceable to the abortive registration and election laws, and without giving in detail our many objections thereto, we deem it sufficient to say that, to the end that every voter may have a free and fair opportunity to cast his ballot, the law-making power of the Territory should revise and reform the existing statutes in this regard as speedily as possible.

The majority of the committee recommended resolutions declaring that the contestant was not elected and confirming the title of the sitting Delegate to his seat.

The House agreed to the resolutions without debate or division.

126. The Massachusetts election case of Galvin v. O'Connell, in the Sixty-first Congress.

Acts of Congress relating to the conduct of contested election cases are directory and not mandatory, and delay of contestant in forwarding testimony to the House within the time specified by law does not vitiate the proceedings.

If it is reasonable to suppose there was error in judgment in counting ballots cast in a portion of the precincts in the district, it is equally reasonable to assume there was error in judgment in counting the ballots in the remaining precincts.

If an issue involves the identification of the person for whom a ballot was counted, such identification may be demanded as a matter of right.

Where the evidence falls to establish a presumption that a recount of the ballots would change the result, the House declined to order such recount.

When, under all forms of law, a person has been duly returned as elected to Congress, it is presumed the count is correct, and a case must be made out clearly warranting the presumption of fraud or mistake in order to justify a recount.

On June 13, 1910,[1] Mr. Charles L. Knapp, of New York, from the Committee on Elections No. 1, submitted the report in the Massachusetts case of Galvin *v.* O'Connell.

The record does not disclose the official returns, but a recount before a bipartisan board under the laws of Massachusetts gave O'Connell 16,553 votes, Galvin 16,549 votes, and two other candidates 1,380 and 1,187 votes, respectively, a plurality of 4 votes for Galvin, the sitting Member.

The contestant made general charges that ballots had been wrongfully counted for the contestee and against him, the contestant.

The taking of the contestant's testimony was completed in January, 1909, but was not forwarded to the Clerk of the House of Representatives until the following August.

The statute provided that—

All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the same, by mail or express, addressed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia.

The contestee denied the jurisdiction of the committee, alleging that the contestant's evidence has not been filed with the Clerk of the House of Representatives within the time prescribed by this statute, but the committee held:

It has been repeatedly held that the acts of Congress relating to the conducting of contested election cases are directory and not mandatory. They are to be construed more with reference to the substantial rights of the parties than to the exact wording of the statutes. (See McCrary on Elections, 3d ed., secs. 337, 338.) There was no wrong intent shown for the delay and as neither party was deprived of any material right by reason of such delay, the committee refused to entertain this technical objection and assumed jurisdiction of the case.

A point at issue involved the contention on the part of the contestant that the ballots in certain precincts should be recounted by the House, and the contention on the part of the contestee that if any of the ballots were recounted the whole number of ballots cast should be recounted.

The committee decided:

It is the opinion of the committee that if on the evidence submitted it would be reasonable to suppose that there was error in judgment in the counting of the ballots cast in the wards and precincts mentioned by the contestant and contestee, it would be equally reasonable to assume that there were errors in judgment in the counting of the ballots in the remaining wards and precincts, and that, if any, all of the ballots cast at said election, aggregating 35,669 should be ordered for recount by the committee and the House.

On the sufficiency of evidence justifying a recount the report continues:

It is a principle well established that when, under all forms of law, a person has been duly returned and certified as elected to Congress it is presumed that the election officers have done their duty and the count is correct. To justify the committee in ordering a recount there should be a case made out that would warrant the presumption of fraud, or, still more, in the case of an alleged mistake or error of judgment in the counting of ballots, a case made out that would clearly justify the presumption that a mistake had been made that would set aside the return. In other words, there must be evidence and proof other than that of speculative possibility.

[1] Second session Sixty-first Congress, House Report No. 1565; Record, p. 7935.

An incidental question concerned the right to require identification of the person for whom any individual ballot was counted.

The chairman of the board of election commissioners of the city of Boston testified as follows:

Question. Do you know of any law requiring an election commissioner to do it [identification of person for whom ballot was counted]?

Answer. I know of no law making it mandatory.

Question. Then the writing of any statement on the ballot is purely at the discretion of the election commissioners?

Answer. I should say so. If the counsel on either side request to have a ballot identified in order that an issue may be brought before a court or legislative body, I believe the election commissioners have the right to identify that ballot.

This evidence is quoted in the report as confirming the opinion that—

A careful examination of the laws and practices governing recounts in the State of Massachusetts, together with the fact that on the recount in this case individual ballots were questioned and identified for whom they were counted, leads the committee to the conclusion that it was the privilege of the respective parties on such recount to question any ballot, have the same examined and passed upon and counted, and to have the same identified for whom such ballot was counted.

No fraud was alleged and the issue resolves itself into a question of the accuracy of the recount.

The election laws of Massachusetts provided that—

SEC. 300. If, on or before five o'clock on the third day next succeeding the day of an election in a ward of a city or in a town, ten or more voters of such ward or town, except Boston, and in Boston fifty or more voters of a ward, shall sign in person, adding thereto their respective residences on the first day of May of that year, and cause to be filed with the city or town clerk, or in Boston with the election commissioners, a statement sworn to by one of the subscribers that they have reason to believe and do believe that the records, or copies of records, made by the election officers of certain precincts in such ward or town, or in case of a town not voting by precincts, by the election officers of such town, are erroneous, specifying wherein they deem them to be in error and that they believe a recount of the ballots cast in such precincts or town will affect the election of one or more candidates voted for at such election, specifying the candidates, or will affect the decision of a question voted upon at such election, specifying the question, the city or town clerk shall forthwith transmit such statement and the envelopes containing the ballots, sealed, to the registrars of voters, who shall, without unnecessary delay, open the envelopes, recount the ballots, and determine the questions raised; but upon a recount of votes for town officers in a town in which the selectmen are members of the board of registrars of voters, the recount shall be made by the moderator, who shall have all the powers and perform all the duties conferred or imposed by this section upon registrars of voters.

The registrars of voters, or in Boston the election commissioners, shall, before proceeding to recount the ballots, give notice in writing to the several candidates interested in such recount and liable to be affected thereby, or to such person as shall be designated by the petitioners for a recount of ballots cast upon questions submitted to the voters, of the time and place of making the recount, and each such candidate or person representing petitioners shall be allowed to be present and witness such recount, either in person, accompanied with counsel if he so desires, or by an agent appointed by him in writing. In the case of a recount of the ballots cast upon a question submitted to the voters, one representative from any committee organized to favor or to oppose the question so submitted shall be permitted to be present and witness the recount. In the city of Boston, the chairman of the city committee representing the largest political party and the chairman of the city committee representing the second largest political party may in writing designate two persons, or such further number as the election commissioners may allow

to be present and witness the count, and said election commissioners shall allow each candidate whose election is in question, or his representative, to be present and may allow representatives of other political parties and other persons to be present and witness the recount.

All recounts shall be upon the question designated in the statements filed, and no other count shall be made, or allowed to be made, or other information taken, or allowed to be taken, from the ballots on such recount.

The registrars of voters or election commissioners shall, when the recount is complete, inclose all the ballots in their proper envelopes, seal each envelope with a seal provided for the purpose, and certify upon each envelope that the same has been opened and again sealed in conformity to law; and shall likewise make and sign a statement of their determination of the questions raised. The envelopes, with such statement, shall, except in Boston, be returned to the city or town clerk, and the clerk or commissioners shall alter and amend such records as have been found to be erroneous in accordance with such determination; and the records so amended shall stand as the true records of the election. Such amended records of votes cast at a State election shall be made and transmitted as required by law in the case of copies of original records.

Upon the application of the contestant and with the concurrence of the contestee the recount was made under this law and the returns determined by the unanimous decision of the board.

And the committee concludes:

It must be borne in mind in connection with this case that the certificate of election is not based on the first return of the election inspectors, but is based upon the unanimous finding of bipartisan recount boards whose character and experience warrant the assumption that they were well qualified for the duties of their positions, and that their experience and familiarity in the counting of ballots justifies the belief that they are specially well qualified to make a correct count of the ballots. Certainly their return should stand until invalidated by proof.

It is the unanimous opinion of the committee that the evidence in this case does not warrant the committee or the House in ordering the ballots for a recount, and that to so order them would be to establish such a precedent as would not be justified in contested election cases. The result of such precedent would be not only to invite election contests in cases where certificates of election were based upon small majorities, but would also enable the contestant or contestee to single out a few ballots indistinctly marked, without proof either for whom they were counted or that they were not counted, as claimed by the respective parties they should be, or that they were wrongfully counted, and on such speculative evidence make Congress a recount board of all ballots cast. In other words, it would be reversing a rule confirmed by a long line of precedents that to justify a recount of ballots by Congress there must be such proof given or case made out as will establish a presumption of fraud or that there has been error or wrongful counting of ballots as would set aside or reverse the return made.

The committee, therefore, unanimously recommended resolutions declaring the contestant was not elected and confirming the title of sitting Member to his seat.

On June 23,[1] after a brief statement by the chairman these resolutions were agreed to by the House without division.

127. The Louisiana election case of Warmoth v. Estopinal, in the Sixty-first Congress.

The election laws of a State are assumed to be valid and constitutional until tested and declared otherwise by a proper tribunal.

A contestant is estopped from charging against the contestee irregularities which he himself practiced.

[1] Second session Sixty-first Congress, Journal p. 827; Record p. 8827; Moores' Digest, p. 320.

On June 13, 1910,[1] Mr. Arthur W. Kopp, of Wisconsin, from the Committee on Elections No. 1, submitted the report of the committee in the Louisiana case of Warmoth *v.* Estopinal.

The official returns from the district gave the contestant 1,916 votes and the sitting Member 13,923 votes.

The notice of contest submitted: First, that the contestee had obtained his nomination under a primary election law which violated the fifteenth amendment of the Constitution of the United States; second, that the contestant was legally nominated, and that as the votes cast for the contestant were the only legal votes cast in said election, contestant upon the face of returns is entitled to the seat in the Sixty-first Congress of the United States to which the contestee has been returned.

The report says:

> The only question involved, then, in this contest is the validity and constitutionality of the primary election law of the State of Louisiana. Your committee does not feel called upon to pass upon this question, for two reasons:
>
> First. The said primary election law has been passed upon in Labauve *v.* Michel (121 La., 374) and held constitutional. It is now charged by contestant that sad law "is in contradiction and defiance of the fifteenth amendment of the Constitution of the United States, and is therefore null and void" and that the election laws of the State are unconstitutional. The constitutionality of the election law of the State of Louisiana has never been tested, and so we must assume that the same is constitutional and valid.
>
> Second. No primary election was, in fact, held by either party for nominating candidates for Representatives in Congress, only one person registering with either party, and so, under the statutes, no primary was held. If the nomination thus secured by the contestee was unlawful, so was that of contestant, and the contestant is therefore estopped in the present case from asserting the invalidity of the nomination secured by the contestee.

The committee, therefore, unanimously recommended a resolution declaring that the contestant was not elected. The title of the sitting Member was not passed upon.

On June 23[2] the House agreed to the report with little debate and without division.

128. The South Carolina election cases of Richardson v. Lever, Prioleau v. Legare, and Myers v. Patterson, in the Sixty-first Congress.

The Supreme Court, and not Congress, is the proper tribunal to determine the constitutionality of a State's election system.

The House will not deny a district representation because reconstruction legislation, as to the qualification of voters has been disregarded.

Votes of persons listed as having been illegally denied the right to vote will not be counted on the strength of a mere certificate to that effect unauthenticated by other evidence.

An election is not invalidated by the failure of the State legislature to comply with the law in providing for registration of electors.

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[1] Second session Sixty-first Congress. House Report No. 1566; Journal, p. 772; Record, p. 7935.

[2] Second session Sixty-first Congress, Journal, p. 827; Record, p. 8830; Moores' Digest, p. 41.

The constitutionality of a State's election laws being challenged, the House declared contestant not elected without passing on the title of the sitting Member to his seat.

On June 18, 1910,[1] Mr. Michael E. Driscoll, of New York, from the Committee on Elections No. 3, reported on the South Carolina election cases of R. H. Richardson *v.* Asbury F. Lever, Aaron P. Prioleau *v.* George S. Legare, and Isaac Myers *v.* James O. Patterson.

Each of these cases involved the same constitutional question passed on in the South Carolina cases of the Fifty-eighth, Fifty-ninth, and Sixtieth Congresses, and the reports are largely in affirmation of the conclusions reached in those cases.

The notice of contest in each case contains allegations of arbitrary rulings and unfair discriminations on the part of election officers, and raises the question of the constitutionality of the constitution of South Carolina and the election laws enacted thereunder.

The same report is submitted for each of the three cases, and the accompanying minority views are practically identical.

As to the votes of persons alleged to have been illegally denied the right to vote, the report says:

> The contestant claimed that upward of 15,000 of his political friends and supporters offered to vote in the various election precincts in said congressional district for him, but were denied that right and privilege, and that if they had been permitted to vote they would have given him a majority over the contestee.
>
> Copies of those lists are set forth in the original record, but do not appear in the printed record.
>
> It is claimed by the contestant that his agents in the various election precincts kept those lists of names of colored citizens who were denied the right to vote. An examination of those lists in the original record does not satisfy your committee that they should be counted as having voted for the contestant in said election or be counted for him now in order to offset the coutestee's majority. The names in each of those lists were apparently written by the same person. There is at the head of some of those lists a form of an affidavit, but none of those persons signed such affidavit himself or swore to it in any form. The method of taking those lists in this case is somewhat different from what it is in the case of Prioleau *v.* Legare. No verified affidavit appears anywhere with relation to those lists, and in their present form they are not competent evidence on which this committee can say they should be counted for the contestant.
>
> Neither the contestant nor his counsel, in the brief or on the argument, gave much attention to those lists, nor did they claim much for them. They did not say that if all the names on the lists were counted they were enough to overcome the majority which the election returns show that the contestee received.
>
> On the other hand, the contestee's counsel stated in his brief and orally that if all the persons whose names appear on those lists were counted for the contestant, the contestee would still have a majority of 4,870; and so far as appears neither the contestant nor his counsel disputes that claim.
>
> Your committee therefore concludes that the contestant was not elected, and he is therefore not entitled to a seat in the Sixty-first Congress from the Seventh Congressional district of South Carolina.

In this conclusion the minority tacitly concurs.

As to the duty of the House in passing on the validity of a State constitution and laws enacted thereunder,

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[1] Second session Sixty-first Congress, House Reports Nos. 1638, 1639, 1640; Journal, pp. 805, 806, p. 8498.

The report concludes:

If the present constitution of South Carolina and the laws enacted thereunder are unconstitutional and void, then the necessary conclusion is that said election was null and void.

If no valid election were held in the Seventh Congressional district of South Carolina on November 3, 1908, and if the House of Representatives should so hold and declare the seat vacant, then no election could be held in said district under the present constitution and laws until they are changed to conform with the constitution of 1868 and the reconstruction act passed by the Congress on June 25, 1868.

That decision would apply to other districts in South Carolina, and with more or less force to other States which were rehabilitated under what are known as the fundamental conditions and reconstruction acts.

In view of the fact that Congress is not the proper tribunal to finally determine the question of the constitutionality of South Carolina's present constitution, and in view of the precedents in other congressional election contests which have come from the State of South Carolina, your committee does not feel justified at this time in reporting to the House that the election was null and void and declaring the seat vacant. That question should be determined by the Supreme Court of the United States. A test case should be made and taken to that court for determination, and your committee earnestly hopes that that may be done at the earliest possible opportunity. The Supreme Court is in a sense continuous and recognizes its own decisions and judgments, while the political complexion of the Congress may change from term to term, and a decision of one Congress might, and perhaps would, be overturned in the next in a case a majority of its members were of a different political party.

A majority of this committee doubts the wisdom or propriety of denying to that district representation in the House of Representatives pending a final decision of the whole question by the Supreme Court of the United States. The members of this committee have not found, or at least do not feel disposed to express an opinion at the present time as to the constitutionality of the laws of South Carolina under which said election was held, and do not feel disposed by their action in this particular case to affirm or deny that said laws are constitutional, and do not wish to establish a precedent one way or the other on that question, and therefore respectfully recommend the adoption of one resolution declaring the contestant was not elected.

In support of this position the report cites decisions in the cases of Prioleau *v.* Legare, in the Fifty-ninth, and Sixtieth Congresses; Dantzler *v.* Lever, in the Fifty-eighth and Sixtieth Congresses; Jacobs *v.* Lever, in the Fifty-ninth Congress; and Myers *v.* Patterson, in the Fifty-ninth and Sixtieth Congresses.[1]

On this phase of the case the minority say:

Although it has been held by the majority of the Elections Committee again and again, with each recurring contest of a similar nature, that the forum in which to test the constitutionality of a state constitution was rather in the courts of the nation than before a committee in Congress, such contests have persistently and contrary to the suggestion of the members of the majority continued to bring these pseudo contests before Congress, although each time there is found to be nothing differentiating the contest now before us from former ones from said State and district, and in none of which has there even been the slightest ground for action favorable to contestant even construing the words of the Federal Constitution that each House of Congress is the judge of the elections, returns, and qualifications of its own Members, in their broadest sense.

The constitution of South Carolina has been in force for fifteen years, thus affording ample time to those who question same to test the validity thereof in the highest court in the land, and the courts are still open for such consideration.

If there be any who desire to raise the question of the constitution and election laws of a State being in conflict with Federal statutes or our national organic law, we consider such a matter should be tested in the courts.

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[1] See secs. 1134, 1135, 7444, of Vol. VI of this work.

Especially this latter principle emphasized by the most recent precedents in such cases or contests, handed down to us by the majority party, to wit: That this Committee on Elections should not usurp the functions of the Supreme Court of the Nation and pass upon the legality of the constitution of South Carolina and its conflict vel non with the national organic law.

In the case of Richardson *v.* Lever, this further question was decided:

A new point is made in this case.

It is contended that the act of the General Assembly of South Carolina, under which the election on November 3, 1908, was held, is not only in violation of the Constitution and laws of the United States, but also contrary to the constitution of South Carolina adopted in 1895.

Section IV of article 2 of that constitution describes the qualifications for suffrage, and among those qualifications is registration which shall provide for the enrollment of every elector once in ten years, and also an enrollment during each and every year of electors not previously registered under the provisions of that article. It also provided that up to January 1, 1898, all male persons of voting age applying for registration who could read any section of the constitution submitted to them or explain it when read should be entitled to register and become electors.

Apparently the general assembly which met in 1896 considered that the registration provided for in the constitution would not be, in the contemplation of the law, complete until the 1st of January, 1898, and that the next registration thereafter should be taken in 1908, and it enacted a statute to that effect.

The general assembly did not in the year 1906 provide for registration or enrollment of electors, as the contestants claim should have been done; but it did, by an act approved January 24, 1908, provide for such general registration or enrollment. The contestant claims that since this second registration under the 1895 constitution was not made until 1908, the election held on November 3, 1908, in pursuance of that registration was null and void.

This committee is inclined to adopt the construction of the constitution given to it by the general assembly and hold that the second registration in 1908 was ten years after the first, which was completed on January 1, 1898. But suppose the contestant's contention is correct that the second registration should have been taken in 1906 and the general assembly of the State neglected to provide for it, what then? Should elections in the State be made impossible and government cease because the general assembly of 1906 neglected its duty? It seems quite clear that if the general assembly of 1906 committed an error in not providing for a general registration of the electors that the general assembly of 1908 corrected that error and cured the defect by making provision for such registration, and that so far as this question goes the election was regular and valid.

Your committee therefore respectfully recommends the adoption of the following resolution:

"Resolved, That R. H. Richardson, contestant, was not elected a Member of the Sixty-first Congress from the Seventh Congressional district of South Carolina and is not entitled to a seat therein."

In each report the majority of the committee recommend a similar resolution declaring the contestant was not elected, and omitting the usual resolution confirming the sitting Member's title to his seat.

In dissent the minority say:

We find ourselves unable to agree with our confreres of the majority in all particulars, though concurring with them in many respects as to the merits of the contest.

The difference between the majority and minority is that the majority reports and recommends the adoption of a resolution simply declaring that contestant was not elected; whereas the minority recommends a resolution declaring that contestant was not elected and that contestee was elected.

The majority resolution herein overturns even the very latest precedents established by the same majority party in this House and totally indifferent to such precedents harks back to earlier Congresses, ignoring, without even differentiating so as to show the slightest reason therefor, the majority report of the committee in the Sixtieth Congress made and adopted by the House in a contest case identical in character.

The report and recommendation thus ignored without rhyme or reason by the majority of this committee was a report submitted on the part of this committee in the Sixtieth Congress by the gentleman from Illinois, Mr. Mann, acting on behalf of said committee, which recommendation was adopted by the House.

The present majority report further ignores another precedent of the Sixtieth Congress, to wit, the report of the Committee on Elections No. 1, submitted on January 5, 1909, in the case of Prioleau *v.* Legare, and also that in the case of Myers *v.* Patterson in the same Congress, which were adopted.

In the present report submitted by the majority, while containing the language, "There are many precedents for this action which the committee feels constrained to respect," yet there is an absolute failure to respect the very latest precedents in the last Congress where the same party as that to which the present majority belong was likewise the majority party.

The minority of the committee submitting this report, while agreeing almost entirely with the majority hereon on the main features in this contest and their conclusions on same, are so thoroughly convinced that the action of the majority in overturning the lastest precedents of their own party as to the substance of resolutions recommended, that we can not subscribe to the inconsistencies of the present majority.

That contestant, R. H. Richardson, was not elected a Member of the Sixty-first Congress from the Seventh Congressional district of South Carolina, and is not entitled to a seat therein, is admitted by every member of your committee, irrespective of party afiliation. And the reasons and precedents cited in this minority report show conclusively that the majority hereof, in order to be consistent, and if not a majority of this committee, at least a majority of this House, should conclude that the contestee was elected and is entitled to such seat.

The minority of your committee therefore respectfully recommend, in accordance with the very latest precedents of this House, the adoption of the following resolution:

"Resolved, That R. H. Richardson was not elected a Member of the Sixty-first Congress from the Seventh Congressional district of South Carolina, and is not entitled to a seat therein.

"Resolved, That Asbury F. Lever was elected a Member of the Sixty-first Congress from the Seventh Congressional district of South Carolina, and is entitled to a seat therein."

These views have been submitted, not for the purpose of a contest on the floor of the House, because there is now no practical result to be accomplished by such a contest, but in order that the views of the minority may be preserved in the record and that justice may be done the people of South Carolina, and that the inconsistent attitude of the majority party may be pointed out.

On June 23,[1] the House, without debate or division, agreed to the resolutions recommended in each majority report.

[1] Second session Sixty-first Congress, Journal, p. 827; Record, pp. 8830–8833; Moores' Digest, p. 42.